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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH KARL GARLOCK,

Defendant and Appellant.

E064113

(Super.Ct.No. RIF1409750)

OPINION

APPEAL from the Superior Court of Riverside County. Rebecca L. Dugan,  
Judge. Affirmed.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for  
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Joseph Garlock appeals from the superior court's partial denial of his Proposition 47 petition for resentencing regarding his conviction for second degree commercial burglary (Pen. Code, § 459).<sup>1</sup> We affirm the court's ruling.

### **FACTS AND PROCEDURE**

On July 22, 2014, at about 2:00 a.m., defendant took scrap metal from an industrial building.

On October 6, 2014, defendant pled guilty to second degree commercial burglary, felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and misdemeanor use of a controlled substance (Health. & Saf. Code, § 11550, subd. (a)). Defendant admitted to having a prior strike conviction. Also on that date, the trial court sentenced him to the upper term of three years for the burglary, doubled for the strike prior, plus eight months for the felony possession, also doubled for the strike prior, for a total sentence of seven years and four months.

In November 2014, California voters approved Proposition 47. "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47.” (*Id.* at p. 1092.)

On December 30, 2014, defendant filed a petition under section 1170.18 seeking to have his burglary and drug possession convictions reduced to misdemeanors.

On July 6, 2015, the People filed a response agreeing with defendant as to the drug possession conviction but disagreeing as to the burglary conviction.

At the hearing on the petition, held on July 10, 2015, the superior court granted the petition regarding the drug possession conviction, but denied it regarding the burglary conviction, “based on the fact that it was not a commercial establishment open during normal business hours.”

This appeal followed.

### **DISCUSSION**

Upon defendant’s request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, which he has done. Defendant argues: (1) his crime can be classified as either petty theft under section 490.2 or shoplifting under section 459.5 because he was caught with about \$100

worth of scrap metal, well under the \$950 limit; and (2) he was denied representation by an attorney of his choice at the petition hearing. We disagree.

Among the crimes reduced to misdemeanors by Proposition 47, rendering the person convicted of the crime eligible for resentencing, are: petty theft, defined as theft of property where value of the money, labor, real or personal property taken does not exceed \$950 (§ 490.2); and shoplifting, defined as “entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours,” where the property value does not exceed \$950 (§ 459.5)<sup>2</sup>. (§ 1170.18, subd. (a).) Section 1170.18 does not list section 459, the offense at issue in the present appeal, as one of the code sections amended or added by Proposition 47. (*Ibid.*) Proposition 47 left the offense of second degree commercial burglary unchanged, and that offense is a felony regardless of the amount stolen. (§ 459.)

In addition, burglary is not simply a theft crime. “Every person who enters any house . . . shop . . . warehouse . . . store . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary.” (§ 459.) Entering a building with the intent to commit theft distinguishes burglary from petty theft under section 490.2. Defendant admitted to this element of burglary when he pled guilty.

Further, defendant has not shown that he entered a commercial establishment while it was open during regular business hours, and in fact the record indicates the

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<sup>2</sup> Section 459.5 goes on to make clear that “Any other entry into a commercial establishment with intent to commit larceny is burglary.”

contrary, and so he cannot show that he is instead guilty of mere shoplifting. (§ 459.5.) He did not provide any supporting documentation with his petition and did not cite to the record or other evidence. In other words, defendant simply failed to satisfy his burden to show that he was eligible for relief in this regard.

Finally, defendant was represented by the public defender at the hearing on his petition. Although he complains he was not represented by counsel of his choosing, he presents no evidence, or even allegations, that he ever requested different counsel.

We have now concluded our independent review of the entire record and find no arguable issues. (*People v. Kelly* (2006) 40 Cal.4th 106, 124.)

#### **DISPOSITION**

The superior court's order denying in part defendant's petition for resentencing is affirmed.

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RAMIREZ  
P. J.

We concur:

McKINSTER  
J.

MILLER  
J.